

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 19-6-1996

CRIMINAL APPEAL No. 92 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE

AND

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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IBRAHIM MAMAD MUSALMAN

Versus

STATE OF GUJARAT  
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Appearance:

MR. P.B MAJMUDAR, Advocate for the appellant.

MR. S.T. MEHTA, PUBLIC PROSECUTOR for the Respondent.  
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CORAM : MR.JUSTICE S.D.DAVE and  
MR.JUSTICE H.R.SHELAT

19/06/96

ORAL JUDGEMENT(Per: H.R. Shelat, J.)

The appellant was placed on trial before the then learned Sessions Judge, Kuchchh at Bhuj, to answer the charge of the offence punishable under Section 22 of the

Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'the Act') in Sessions Case No. 8 of 1991 on the file of the Court. The trial ended in conviction and the appellant came to be sentenced to rigorous imprisonment for 10 years and a fine of Rs.1,00,000/-, in default rigorous imprisonment for one year more. Shorn off unnecessary details, the case of the prosecution is as under:-

2. Mr. K.J. Gohil, at the relevant time serving as Police Inspector, Kuchchh at Bhuj, was informed by the then District Superintendent of Police that one person was to pass by the road between Bhidnaka-Rajmandir Cinema Road with brown sugar. He therefore called the panchas. The policemen and panchas were then deployed on the road-side for surveillance. He was also keeping a close watch on the traffic. Some time after he could mark that one person was sneaking and tucking. He therefore suspected and guessed that he might be the same man about whom the D.S.P. had informed him. He then intercepted and took his search. From his cloth-bag brown-sugar weighing about 3 Kgs. was found. He did not have any pass or permit to possess. The Police Sub-Inspector, Mr. Gohil then could see that the person i.e., the present appellant had committed the offence under the Act. He lodged the complaint and investigated into the matter. At the conclusion of his investigation he filed the chargesheet before the lower court. The learned Sessions Judge after the receipt of the chargesheet heard both the parties and framed the charge at Exh.13. The appellant pleaded not guilty. The prosecution then led necessary evidence. Appreciating the evidence on record the learned Judge found that the prosecution had, beyond reasonable doubt, succeeded in establishing the charge levelled against the appellant. He therefore held the appellant guilty and sentenced him as aforesaid. It is against that order the present appeal has been filed before this court.

3. Mr. P.B. Majmudar, learned Advocate representing the appellant submitted that the mandatory provision of Section 50 of the Act was not followed. The opportunity of being searched in the presence of a gazetted officer or a Magistrate was not given and thereby the mandatory provision was set at naught, entitling the appellant to have the acquittal. No other ground was emphasized. Mr. Mehta, the learned A.P.P. submitted that there was no good reason to upset the decision of the lower court. He took us to the entire evidence so as to convince us that no error was committed by the lower Court.

4. When both have virtually tapered off their submissions confining to Sec. 50 of the Act, we would not dwell upon other points, we would confine ourselves to the operation of Section 50. As per Section 50 of the Act, it is obligatory on the part of the searching officer to inform the accused that he has a right to have his search in the presence of a Gazetted Officer or a Magistrate. Further the prosecution has to prove that the accused was made aware about his such right and opportunity to choose was given regardless of the initiation thereof was made or not by the accused. If no evidence to that effect is given, it should be assumed that accused was not informed about his right. Consequently the court must find that the possession of illicit article was not established. For our such view, a reference of the pronouncement of the Apex Court in the case of Saiyed Mohd. Saiyed Umar Saiyad & Others vs. State of Gujarat, 1995 Supreme Court Cases (Cri.) 564 = [1995(2)] XXXVI (2) G.L.R. 1315 may be made. When the law is accordingly made clear by the Apex Court, what is required to be perused is whether the investigating agency fulfilled their obligation by affording the opportunity to the appellant of being searched in the presence of a Gazetted Officer or a Magistrate. We, with meticulous care and finicky details examined the evidence on record and nowhere we found about the opportunity having been given to the appellant. The FIR is silent on the point. Likewise the panchnama. The Investigating Officer who is examined at Exh. 21 has made no reference about the opportunity if at all given. When we made query to the learned Additional Public Prosecutor Mr. Mehta, he laboured much going through the entire evidence but failed to point out anything on the record indicating that the opportunity as required under Section 50 of the Act was given to the appellant and thereby obligation under mandatory provision was fulfilled. It is therefore clear that in this case there is a failure on the part of the investigating agency in providing the opportunity to the appellant as mandated by Section 50 of the Act. When that is so, the appellant has lost his valuable right and consequently the contemplated protection. He is therefore entitled to be acquitted as the conviction cannot be sustained. The appeal for that purpose is required to be allowed.

5. We are conscious of the fact that by the alleged hazardous wrong public health is jeopardized and people, more particularly the young generation is made hapless and a dead-wood and in the long-run, it not only weakens the Nation but endangers the Independence also. We

therefore agree with learned Additional Public Prosecutor that the wrong-doer cannot be let go unpunished. But we as Court of law have to see that the guilt is brought home without any reasonable doubt by the prosecution in accordance with law. If for one or another reason or applicability of the provision of law or lapses of investigating agency the accused gets the benefit, or the act does not become the wrong in the eye of law, the Court cannot being obsessed with public health, punish the accused. In the case on hand, aforesaid mandatory provision is not followed and hence with reluctance the appeal is required to be allowed. The contention therefore cannot find favour. If prosecution owing to peculiar provision finds that object of the Act is frustrated, it is open to it to appeal to the Parliament.

6. For the foregoing reasons, the appeal is allowed. The judgment and order convicting the appellant of the offence under Section 22 of the Narcotic Drugs and Psychotropic Substances Act and sentencing to rigorous imprisonment for 10 years and a fine of Rs.1,00,000/- in default rigorous imprisonment for one year more are hereby quashed and set aside and the appellant is acquitted thereof. Fine if paid be refunded.

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